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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK *et al.*,
Petitioners,

v.

ROGER W. HUDSON *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association ("NEA") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that certiorari was improvidently granted but urging that if the Court reaches the merits the decision below should be reversed.[1]

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[1] Pursuant to Rule 42(2) of the Court's Rules, amicus has requested, but not received, the parties' consents to the filing of this brief.

The National Education Association is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or who is interested in advancing the cause of education. NEA was organized in 1857 and was chartered in 1906 by a special act of Congress. Its statutory purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States." 34 Stat. 805. NEA presently has 1.8 million members, most of whom are teachers in public educational institutions.

A major interest and objective of NEA is to secure equality of education and sound education for children of all races. It is committed to the goal of full and effective desegregation of all school systems in the country and to the attainment and maintenance by each school district of a genuine unitary system with no trace of racial discrimination. To that end, NEA has participated as amicus curiae in numerous cases involving issues of school desegregation, most recently in *Pasadena City Board of Education* v. *Spangler*, 44 U.S.L.W. 5114 (June 24, 1976).[2]

At the same time, NEA is equally committed to safeguarding the rights of teachers. In furtherance of this concern, it has participated as amicus curiae in cases before this Court presenting issues concerning, *inter alia*, the rights of teachers to the substantive and due process guarantees of the First and Fourteenth Amendments.[3]

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[2] NEA also submitted amicus briefs in *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189 (1973); *School Board of the City of Richmond, Virginia* v. *State Board*, 412 U.S. 92 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

[3] See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

NEA's members thus have a substantial interest in the case at bar insofar as it involves the extent to which school authorities, properly concerned to achieve a truly unitary school system, may intrude upon the associational rights of teachers. More specifically, this case presents difficult and sensitive issues raised when a teacher-parent's fundamental right to educate his or her child in a private school, recently reaffirmed by this Court in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034, 5039 (1976), is made grounds for termination by school administrators pursuant to a program of ending all vestiges of a previously segregated school system.

In light of its twin commitments to effective school desegregation and the right of teachers to be protected from unconstitutional terminations, commitments which it believes need not and should not be incompatible, NEA is vitally interested in the determination of the issues raised by this case. Further, NEA believes that it may be of service in presenting to the Court principles and guidelines by which the conflict presented in this case may be resolved.

Additionally, NEA wishes to bring before the Court the issue whether this Court should dismiss the writ of certiorari as improvidently granted. So far as we can determine, that issue will not be briefed by the parties. This case presents particularly compelling reasons to choose this course of action: in light of this Court's decision of June 24, 1976, in *Runyon* v. *McCrary*, *supra*, the stark factual circumstances presented by the case are unlikely to arise again; and a supervening state statute enacted since the commencement of the litigation will bar the question from arising again in the State of Mississippi. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Wherefore, the National Education Association requests that this Court grant leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

STATEMENT OF FACTS

The Calhoun County, Mississippi, Board of Education refused to rehire for the 1973-74 school year three teachers, Loula J. M. Adams, Billy D. Cook and Mrs. W. P. Wright, because the children of these teachers were enrolled at the private, racially segregated white Calhoun Academy. The board acted pursuant to its policy, adopted in November 1972, that:

> "[P]rior to the employment of a new teacher or the reemployment of an existing teacher the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed." (App. 9)[1]

A. The Adoption of the Policy

On August 9, 1968, the United States District Court for the Northern District of Mississippi placed the Calhoun County school system under a desegregation order (Pet. App. 30a; App. 382). In the 1969-70 school year, complete desegregation of the system was ordered (Pet. App. 31a), and by the 1970-71 school year, the school system was fully desegregated (Pet. App. 4a).

The Calhoun Academy was established as a racially segregated, white private school in August 1968 (Pet. App. 31a). Several teachers in the Calhoun County public school system sent their children to the Academy (App. 217).

Prior to the adoption of the school board policy in November 1972, the board had "fairly frequent[ly]" heard reports from parents that children "wanted to know why so-and-so was [a] teacher and her kid was in a private school" (App. 217). The school authorities considered the policy for two or three years before adopting it (App. 211, 232). In February 1972, the superintendent of the Calhoun school system, John G. Burt, proposed that the policy be adopted (App. 151). In July 1972, Roger W. Hudson, the principal of the Calhoun Attendance Center, one of the several schools in the system, on his own authority announced to the teachers there that the policy was in effect (App. 33-34). On October 9, 1972, the attorney for the school board wrote to the United States Department of Justice requesting its opinion as to the validity of the policy (App. 391-92). On November 6, 1972, the Assistant Attorney General for Civil Rights wrote a generally favorable reply to the school board, reserving, however, comment on "any 'due process' or 'First Amendment' issues" raised by the policy (App. 402-03). Later in November 1972, the board formally adopted the policy (App. 33).

[1] The decisions below are cited to the appendix in the petition for certiorari, referred to as "Pet. App. ——." References to the record are cited to the general appendix before the Court and are denominated as "App. ——."

Superintendent Burt testified that he recommended the policy "in order to comply with the court order and to carry out the job of running the best schools . . . possible" (App. 141). He stated that he felt that having a child in private school "affect[s] [a] teacher['s] . . . performance" and that "we needed total cooperation and dedication from all people concerned with the public schools" (App. 141).

Principal Hudson testified that the policy was adopted "to promote the unitary system . . . [a]nd we feel that if a teacher [has] divided loyalties that her efficiency, productivity, is not going to—is definitely going to be affected" (App. 27). Thus, Mr. Hudson "assumed" that a public school teacher's efficiency and productivity would be detrimentally affected because the teacher's child was in private school (App. 27).

The letter which counsel for the school board Paul M. Moore wrote to the Justice Department stated that the board was considering the rule because "certain of the teachers . . . have children that they are sending to private schools" (App. 392). Counsel further stated in the letter that

> "I advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their

> action was correct. The board also feels that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children." (App. 392).

Upon receipt of the Justice Department's response (App. 402), the board adopted the policy. School board president Mallory testified that the board had acted because of the establishment of the Calhoun Academy (App. 189-90, 215). Mr. Mallory testified that the board "didn't think" that a teacher who had children in the Calhoun Academy "would be dedicated to the public school system" (App. 199-200). He said, "[I]f the teacher has got a kid in one school they are bound to have, you know, some loyalty to that school. And we just—it was our opinion that they wouldn't be as fully dedicated to the school system" (App. 215).

Mr. Mallory further testified that "people that have kids in the private schools, especially at the time of the organization, were hard prejudiced against the public schools. . . . Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought." (App. 201). He also testified that "it's hard to believe, now, for me personally to believe that all of the prejudice that these people have is gone, you know, completely enough that they could dedicate theirselves to the public school system." (App. 203). Finally, he testified that "[t]here has got to be just a little friction, you might say, or animosity between some of these people, you know, that teach at these—that have kids in the private school and public schools, in my opinion" (App. 211).

B. Application of the Policy

The board policy was applied to the teachers by their principal, Mr. Hudson. Mr. Hudson testified that he understood the policy to apply to all private schools (App. 26, 39). He testified that the policy was a "blanket policy" that applied to "everyone, black or white," "rich, poor," "yellow, green," and that he had faithfully carried out the policy "in every instance" (App. 18-19). The rule was "absolute and inviolate" (App. 25), and it "didn't matter if [the children] were not mentally alert or had some defect in hearing" (App. 25) or if the teacher wanted to send his children to a "parochial" school (App. 25-26). The policy was still "applicable" (App. 26). Thus, the principal had notified two black teachers whose child was not enrolled in the Calhoun County schools that the policy applied to them. The teachers retained their jobs only by showing that their child did not live with them and was in the public school system in Atlanta, Georgia (App. 19-20).[2]

When the school board adopted the policy, eight teachers had their children in the Calhoun Academy (App. 217). Five removed their children, but petitioners Adams, Cook and Wright did not.

Each of the petitioners was conceded to be a qualified teacher (Pet. App. 33a). Each had taught for at least four years prior to his or her dismissal (App. 12, 13, 14), and the board had never received any complaints about

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[2] There was discussion in the record about application of the policy to Mr. Hamblin, a teacher at the Calhoun Attendance Center. His children had been in the Magnolia School for the Deaf for the 1972-73 school year. It appeared that the policy did not affect him for that year because that school, which had "access to state funds," was considered a public school (App. 157). Mr. Hamblin transferred his children to the Calhoun Academy for the 1973-74 school year (App. 157-58), and, when Superintendent Burt found this out, he told Mr. Hamblin that he would "not be reemployed" if his children remained at the Calhoun Academy (App. 156).

the petitioners' teaching being affected by their children's attendance at private school (App. 227). Similarly, Mr. Mallory, the board's president, had never heard any of the petitioners say anything derogatory about the public school system (App. 231). The record is likewise devoid of any evidence indicating that these teachers had had any racial difficulties with the black children in their charge.

The teachers were terminated for the sole reason that they had sent their children to the Calhoun Academy (App. 237). At the district court hearing, the teachers each stated several innocuous reasons for sending their children to the Academy, but the credibility of their testimony was substantially undermined on cross-examination.

C. Defense of the Rule

The school board defended the validity of the rule in the district court largely on the basis of the testimony of the school board president, school superintendent, school principal, and school board counsel, summarized above, and the testimony of two expert witnesses, Dr. Francis Eicke and Dr. Grady Harlan. Both Dr. Eicke and Dr. Harlan testified, in substance, that any public school teacher who sent his children to any private school detrimentally affected the public school system.

Dr. Eicke was Assistant Professor of Guidance and Educational Psychology at the University of Mississippi (App. 98). He testified that a "teacher sending children to a private school would be evidencing a rejection of the public school system" and that the "students would perceive this rejection and as a result would react to the teacher in a different kind of way than if they perceived the teacher as totally committed to the education system" (App. 100). He also testified that a "teacher that rejects the public school system as acceptable for their own children would set lower expectations" for public school

children, although "not [as] a conscious kind of thing," and "if a teacher expected less from students th[en] the students would tend to perform at a lower level . . ." (App. 101-02). On cross-examination, Dr. Eicke expressed the view that "every teacher who is being paid by the State of Mississippi owes an obligation to send his or her child to a public school" (App. 109), and that "every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her child to a public school" (App. 109-10). He further testified, however, that there might be legitimate exceptions to a prohibition barring public school teachers from sending their children to private school and, therefore, that a school system's policy "should not be a blanket policy but that each case should be taken on its individual merits and decided on those merits" (App. 113).

Dr. Harlan was Professor and Chairman of the Department of Guidance and Educational Psychology at the University of Mississippi. Dr. Harlan testified that teacher expectations affect learning (App. 125-27) and that, if a public school teacher sent his child to private school,

> "that would set up a system where other students would perceive or could perceive the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend" (App. 123).

Dr. Harlan further testified that

> "if the student is perceiving the teacher as negative and that it is not a viable place for your own children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, probably would not achieve as well" (App. 124).

As to the policy in question, his "opinion would be that if the entire teaching staff is committed to furthering the public education in that county, then the students have a better chance of being successful, achieving" (App. 125). Dr. Harlan also testified that, even for a teacher who sent his children to private schools, he "wouldn't have an opinion on any particular teacher [but] would have to talk to the specific teacher on that" (App. 127). On cross-examination, Dr. Harlan testified that he had made an examination of one school in the county where he had "been attempting to increase the interaction between the school and the community and the student and the teacher in public schools," and his testimony was based in part on his observations at that school (App. 129). He had, however, not spoken to any students at that, or apparently any, school to see what effect the policy would have on them (App. 136-37). Dr. Harlan testified that it was his opinion "that you should support public education if you are a public school employee" (App. 130). He testified that if a teacher taught at a state university, he should send his child to the public schools (App. 132), and that if a public school teacher wanted to send his children to parochial school, the teacher "should make a decision about whether or not" he wanted to continue working in the public schools (App. 133-34).

D. The District Court Opinion

The district court upheld the validity of the terminations. The court found that the petitioners were "otherwise qualified to continue their teaching duties" (Pet. App. 33a), and that the "sole reason" for the board's refusal to reemploy them was their refusal to comply with the board policy (*id.*). The court recognized that "literally" the board's policy applied to all private schools, but stated that the "undisputed proof shows that the school board, the plaintiffs and the local community understood that the regulation was adopted, and has been applied, only as to public school teachers who patronize" the Calhoun Academy (Pet. App. 37a). Thus, the court did not consider the policy in terms of other private schools, stating that "[s]ince private schools of that nature are not attended by plaintiffs' children, they cut no figure in this case" (Pet. App. 37a).

The court upheld the terminations because it concluded that the rule was an "appropriate measure" to eliminate racial discrimination from the public schools" (Pet. App. 38a). The court stated that it "accept[ed]" the expert testimony that the "policy was significantly related to a teacher's effectiveness and job performance" (Pet. App. 38a). The court said, "[S]tudents in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level" (Pet. App. 38a). The court stated that "an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools" (Pet. App. 39a).

The court found "as a fact" that the "dominant, if not sole, reason why each [petitioner] enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system" (Pet. App. 34a). The court concluded that the "board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools" (Pet. App. 39a).

E. The Court of Appeals Opinions

The court of appeals affirmed the district court by a 2-1 vote, splitting three ways and writing three opinions. In a statement of facts agreed upon by each of the judges on the panel, the court of appeals approved the narrowing construction given the policy by the district court, stating that the "approach of reviewing the policy narrowly as it was intended and applied, rather than broadly as it was adopted, has the pragmatic virtue of facing up to the real issue between the parties and producing a resolution of that issue on its merits now" (Pet. App. 5a).

Judge Coleman voted to affirm the district court's decision because he saw the board's policy as an attempt to "promote the unity of, and public confidence in, the public school system" (Pet. App. 12a), and concluded that it fell within the "general, discretionary power of school boards to manage public schools" (Pet. App. 12a). Thus, he determined that the parental rights asserted by the teachers had to give way to the "considered judgment of the school board" (Pet. App. 11a). Judge Coleman saw "no necessity to put a 'desegregation' gloss on the decision" (Pet. App. 12a).

Judge Roney also found the policy acceptable, but only on the "particular facts" of the case and he did "not get to the question of the validity of the general policy unrelated to this specific case of court-ordered desegregation" (Pet. App. 13a-14a). He stated that "it would have been preferable for the school board to treat each plaintiff individually," but found that the "district court had a sufficient base to apply the general evidence to the individuals" (Pet. App. 13a-14a). He concluded that, in the particular circumstances, the "school authorities acted within their discretionary authority" (Pet. App. 13a).

Judge Clark dissented, stating that the board was impinging on a fundamental constitutional right of the

teachers; that to do so, it had to narrowly tailor the means chosen to effectuate its ends; and that it had not done so here since no determination had been made of the "unfitness" of the particular teachers not reemployed (Pet. App. 15a-16a, 20a). He stated that there had been no showing that the teachers' sending of their children to the Calhoun Academy had caused any "material and substantial disruption" of the teachers' performance of their duties, and he concluded that the board's failure to make such a showing caused the terminations to be unconstitutional (Pet. App. 27a-28a).

A petition for rehearing was denied, five judges noting their dissent. (Pet. App. 1a).

SUMMARY OF ARGUMENT

1. The writ of certiorari should be dismissed as improvidently granted. The particular factual circumstances of this case are unlikely to arise again. After *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), private academies are unlikely to continue a self-proclaimed policy of segregation; school boards are unlikely to have occasion to adopt rules like that at issue here; and, if such a policy were adopted, the inferences to be drawn from a teacher's enrollment of his child at a private school within the purview of the policy would be more ambiguous. Furthermore, a state statute passed after the commencement of this litigation bars the question from arising again in the State of Mississippi. Under these circumstances, the difficult constitutional questions raised herein should be left until a more representative case appears. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

2. Should the Court reach the merits, the judgment below should be reversed.

(a) That parents have a constitutional right to educate their children in private schools, rather than the public schools provided by the state, is well established by the decisions of this Court. *E.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). This constitutional right of association is not lost because the particular private school chosen teaches and represents offensive racist beliefs, or because the school may operate in violation of 42 U.S.C. § 1981.

(b) (1) A school board may penalize a teacher's assertion of his constitutional rights only if that assertion will materially and substantially disrupt or pose a substantial threat of materially disrupting the educational process. A school board's forecast that a teacher's activities pose a substantial threat of material disruption must be based on concrete facts. *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503 (1969); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). (2) Even in asserting the state's substantial interest in preventing material disruption or substantial threat of material disruption to the educational process, a school board must minimize infringement upon a teacher's constitutional rights. (3) A school board cannot, pursuant to a general rule, penalize a teacher's mere association with an unpopular private group unless it can show that such association will cause substantial harm to the state's interest in each case covered by the rule.

(c) (1) The board's policy—even when limited to the racially segregated Calhoun Academy—sweeps too broadly. The policy unconstitutionally penalizes the teachers solely because of their association with the Calhoun Academy occasioned by the enrollment of their children there. (2) The board's policy as applied to these teachers is unconstitutional because there were no facts in the record showing that the teachers had materially disrupted

or posed a substantial threat of material disruption to the educational process in the Calhoun County public schools.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

This case presents substantial and difficult questions of constitutional law, raising a potential conflict between the First Amendment's guarantee of freedom of association and the Fourteenth Amendment's requirement that public schools be free of all aspects of racial segregation. There are compelling reasons why this Court should choose not to face those questions in the present context and instead dismiss the writ of certiorari as improvidently granted.

In light of this Court's decision in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), the stark factual circumstances of this case are unlikely to arise again. In *Runyon*, this Court held that white, segregated academies violated 42 U.S.C. § 1981 by refusing to contract with black parents for the education of black children. The *Runyon* holding should go far toward eliminating self-proclaimed segregation on the part of white academies. The effect will be to make more ambiguous the inference to be drawn from a teacher's sending his child to private school. There doubtless still will be situations in which a board concludes that a teacher's actions outside the school will undermine his students' ability to learn inside the school. But whatever the context that might again bring to this Court the question whether a school board may rely on a teacher's outside activities as a basis for a decision against reemployment, that context will not be the enrollment of the teacher's offspring in a private school with a lawful policy of excluding black students.

Moreover, it was the presence and operation of such a self-proclaimed, segregated white academy in Calhoun County that apparently led the Calhoun County School Board to adopt the rule at issue in this case. The decision in *Runyon* making unlawful the operation of such academies makes even more speculative the possibility that any school board would adopt such a rule in the future.

In Mississippi itself, where the Calhoun Academy is located, a like case should not arise again. Since the initiation of this suit the Mississippi State Legislature passed a statute which bars school boards from refusing to reemploy teachers and other school personnel solely on the ground that they had sent their children to private school. Miss. Code Ann § 37-9-59 (March 27, 1974). The statute provides:

> "The governing authorities of every school district in this state are hereby prohibited from denying employment or reemployment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed."

There is no indication in the record that the statute has retroactive effect. However, the passage of the statute should prevent the present set of facts from arising again in the State where this suit arose.

The appropriateness of dismissing the writ as improvidently granted in this case is demonstrated by the Court's decision in *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). There, the Court dismissed a writ as improvidently granted because of a state statute enacted after the commencement of the

litigation which barred the question presented from ever arising again in that State.

In *Rice*, plaintiff contested the constitutionality of an Iowa decision which permitted cemeteries to deny burial to non-caucasians. The case came to the Court in the immediate wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and presented complicated issues of "state action" as well as the issue whether the Fourteenth Amendment condemned the practice complained of. Initially, the Court affirmed the Iowa Supreme Court's decision by an equally divided vote. On petition for reconsideration, however, the Court focused for the first time on a supervening Iowa statute which, while not applicable to the parties at bar, substantially diminished the public importance of the case. Paying special heed to the "Court's duty to avoid decision of a constitutional issue unless avoidance becomes evasion" and the impact of the supervening law, the Court determined to vacate its judgment and dismiss the writ as improvidently granted. 349 U.S. at 74. In response to the contention that the case presented questions of special importance to the parties, the Court said:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true when the issues involved reach constitutional dimensions . . . ." 349 U.S. at 74.

The case now before the Court presents reasons at least as compelling as those in *Rice* for the Court to dismiss the writ as improvidently granted. As we have demonstrated, the particular factual circumstances pre-

sented by the case are unlikely to arise again because of *Runyon*, and, just as in *Rice*, a supervening state statute enacted since the commencement of the litigation will bar the question from arising again in the State of Mississippi. Thus, though the petition presents questions which are "intellectually interesting and solid," those questions would be better decided in a case of more general significance. The writ should be dismissed as improvidently granted.[3]

II. IF THE WRIT OF CERTIORARI IS NOT DISMISSED, THE JUDGMENT BELOW SHOULD BE REVERSED

The Calhoun County School Board refused to reemploy the petitioner teachers solely because the teachers had sent their children to the Calhoun Academy (App. 227). We show herein that the Board's action was unconstitutional because it impermissibly presumed, without adequate basis, that the teachers' association with the Calhoun Academy through the exercise of their constitutional right to send their children to private school posed a substantial threat to the educational process. We discuss, first, the nature and derivation of the teachers' constitutional right at stake; second, the appropriate method to resolve the conflict between that right and the board's interest in eliminating the vestiges of a dual school system; and, third, the reasons why the board's rule is unconstitutional, both as construed below and as applied.

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[3] See also *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting): Among the considerations traditionally guiding the Court in determining whether to deny a writ of certiorari are (1) that the issue presented is "too moribund for adjudication" and (2) that the question whether the issue presented is likely to be of general significance had "better await the perspective of time."

A. The Teachers Had a Constitutional Right To Send Their Children to Calhoun Academy

The teachers' right to send their children to Calhoun Academy derives from fundamental constitutional sources including the First Amendment right of association. The constitutional magnitude of the decision to enroll their children at the Calhoun Academy is no less substantial because Calhoun Academy is a racially segregated, private school. Only last term, this Court explicitly acknowledged that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions." *Runyon* v. *McCrary*, 44 U.S.L.W. 5034, 5039 (June 25, 1976).

The substantiality of the constitutional right of a parent to choose to educate his child in a private school, rather than the public school provided by the State, has long been attested to by this Court. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Only recently, the Court said that the "State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Norwood* v. *Harrison*, 413 U.S. 455, 461-62 (1972). Accord, *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1971). On numerous occasions, the right has been deemed "fundamental" and "implicit in the concept of ordered liberty" protected by the Constitution. *E.g.*, *Cleveland Board of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 65 (1973); *Roe* v. *Wade*, 410 U.S. 113, 153 (1972); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). Indeed, this Court has said, "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction

from public teachers only." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

The teachers' choice of the Calhoun Academy as the school for their children does not materially diminish the substantiality of the constitutional interest they assert. *Runyon* v. *McCrary*, *supra*, 44 U.S.L.W. at 5039. The First Amendment protects the right of the Academy's patrons to join together to advance their beliefs, however offensive those beliefs may be to most Americans. As this Court has said, "The freedom to associate applies to the beliefs we share, and to those we consider reprehensible." *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974). Thus, the "State . . . may not restrict speech or association because it finds the views expressed by any group to be abhorrent." *Healy* v. *James*, 408 U.S. 169, 187-88 (1972). Rather, the "freedoms . . . guaranteed by the First Amendment must be accorded the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Id.* at 188. Accordingly, Calhoun Academy's blatant racism does not affect the teachers' constitutional right to send their children there.

Moreover, even if the Academy had refused to contract with black parents in violation of 42 U.S.C. § 1981,[4] the Academy's unlawful action would not negate the constitutional right of the teachers to send their children to the Academy. The Court in *Runyon* distinguished between the parent's right to send their children to any particular private school, which was acknowledged to be of constitutional stature, and a private school's practice of refusing to contract with black parents, which was held to be prohibited by Section 1981. In the instant case, the record indicates that the parents are asserting

[4] The record shows that a Calhoun Academy official testified that the Academy would have refused to contract with black parents, but that no black parents had sought to enroll their children at the Academy (App. 72).

only the constitutional right to send their children to a private school, not the right to insist that the school be or remain racially segregated. Neither *Runyon* nor any decision of this Court has held that an individual's freedom of association is lost simply because the organization with which he is associated has engaged in activities prohibited by law. For example, it has never been suggested that union members forfeit their constitutional right to belong to their union because the union has been found to have violated Title VII of the Civil Rights Act of 1964.[5] See *Elfbrandt* v. *Russell*, 384 U.S. 11, 15 (1965), and *Scales* v. *United States*, 367 U.S. 203, 229 (1961), disapproving "blanket prohibition[s] of association with a group having both legal and illegal aims."

In sum, the teachers had a constitutional right to send their children to the Calhoun Academy.

B. A School Board Cannot Terminate a Teacher's Employment Pursuant to a General Rule Which Bars Mere Association Unless It Can Show That in Every Case Violation of the Rule Will Materially Harm or Substantially Threaten Such Harm to the Educational Process

The magnitude of the teachers' constitutional interests in the case is substantial. See Part A *supra*. Similarly substantial, however, is the State interest asserted in opposition—the constitutional duty of a school board to eliminate all vestiges of a segregated school system. *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971); *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968). The legitimacy of the board's refusal to reemploy the teachers in the instant case turns on the resolution of the conflict between the teachers' individual

[5] The permissible inferences that may be drawn from an individual's association with an organization are further discussed in Part II(B)(3), *infra*.

constitutional interests and the state's compelling goals. In such circumstance, the mode of resolution becomes crucial.

Accordingly, in this section of our brief we discuss what conditions justify governmental infringement of individual rights in order to promote the educational process. We begin with this Court's requirement that an individual's constitutional rights may be infringed only if the exercise of those rights poses a "substantial threat of material disruption" to the work of the school. *Healy* v. *James*, 408 U.S. 169, 189 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). We show that any such threat must be predicated upon concrete facts. *Healy* v. *James*, *supra*; *Tinker* v. *Des Moines School Dist.*, *supra*. Next, we consider the principle established by this Court that even in promoting its legitimate interest in the educational process, government may not unnecessarily infringe upon constitutional rights, but instead must narrowly tailor its methods to further only its legitimate ends. *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). Finally, we conclude with the Court's rule that the state cannot, pursuant to a general rule, penalize an employee for mere association with an organization, regardless of the degree and nature of his involvement, unless it can be demonstrated that harm or substantial threat of harm to the state's legitimate interests will eventually flow from such association in each and every case. *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

1. *A School Board Can Limit the Exercise of Teachers' Constitutional Rights Only If Concrete Facts Exist Warranting the Conclusion That the Exercise of These Rights Will Cause Material and Substantial Disruption or Create a Threat of Material and Substantial Disruption to the Educational Process*

a. *Teachers' Constitutional Rights Can Be Limited Only If Their Exercise Materially and Substantially Disrupts or Poses a Substantial Threat of Material Disruption to the Educational Process*

The initial standard that the board's policy must meet is the rule, well established by decisions of this Court, that First Amendment freedoms may not be limited by the state in the educational context absent a showing of "material and substantial disruption" or a "substantial threat of material disruption" to the educational process. *Healy* v. *James*, 408 U.S. 169, 189 (1972); *Grayned* v. *City of Rockford*, 408 U.S. 104, 117-19 (1972); *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503 (1969). See *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The verbal formula of this rule has developed largely in the context of student assertions of constitutional rights, but both analysis and precedent demonstrate that the same standard should govern teachers' assertions of their constitutional rights.

Initially, it should be beyond dispute that a school board cannot impose whatever restrictions it wishes upon its teachers' exercise of their constitutional rights. "It is much too late to argue," this Court has said, "that the State may impose upon the teachers in its schools any conditions it chooses, however restrictive they may be of constitutional guarantees." *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968). Accord, *e.g.*, *Perry* v. *Sindermann*,

408 U.S. 593, 597 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967).

Rather, as this Court has recognized, a school board's ability to limit its teachers' exercise of their constitutional rights arises only because of the teacher's relationship to the educational process and the state's legitimate interest in "promoting the efficiency" of that process. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (state cannot inquire into all teacher associations since "[m]any such relationships could have no possible bearing upon a teacher's occupational competence or fitness"). So long as "material disruption of the educational process" is understood to mean that school boards need not tolerate teacher conduct that interferes with the efficient operation of the public schools, the "material and substantial disruption" standard seems appropriate to apply in the teacher context. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947) (upholding prohibition of public employees' political activities which "interfere with the efficiency of the public service"); *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) (same).

The lower courts have widely applied the "material and substantial disruption" standard to measure whether a school board may legitimately limit a teacher's assertion of his First Amendment rights.[6] Similarly, in the

[6] Second Circuit: *James* v. *Board of Education*, 461 F.2d 566, *cert. denied*, 409 U.S. 1042 (1972) (First Amendment protects teacher's wearing antiwar armband; mere fear of disturbance does not justify restriction); *Russo* v. *Central School District*, 469 F.2d 623, 632 (1972), *cert. denied*, 411 U.S. 932 (1973) (teacher may not be dismissed for refusing to pledge allegiance to flag, "where there has been no interference with the requirements of appropriate discipline in the operation of the school"); Third Circuit: *Roseman* v. *Indiana University of Pennsylvania*, 520 F.2d 1364 (1975) (teacher's potentially disruptive intramural speech not protected by

single case that this Court has decided concerning a teacher's dismissal because of the alleged impact of the assertion of his constitutional rights on the educational process, this Court held the firing unconstitutional because the teacher's statements, which were critical of the board of education, were "neither shown nor can be presumed to have in any way either impeded the teach-

First Amendment); Fourth Circuit: *Acanfora* v. *Board of Education*, 491 F.2d 498, 501, *cert. denied*, 419 U.S. 836 (1974) (no evidence that "interviews [on homosexuality] disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results" would follow); Fifth Circuit: *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201, 206 (1971) (state has burden of showing that teacher's activities "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); Sixth Circuit: *Whitsel* v. *Southeast Local School District*, 484 F.2d 1222 (1973) (teacher's incitement of students not protected under *Pickering* and *Tinker* standards); Seventh Circuit: *Hostrop* v. *Board of Jr. College Dist. No. 515*, 471 F.2d 488, 492 (1972) ("It has been consistently held that a government cannot punish a person for his speech alone, but only for speech that causes substantial disruption or that hinders the functioning of the state"); *Clark* v. *Holmes*, 474 F.2d 928, 931 (1972) (First Amendment does not protect "uncontrolled expression . . . internally destructive of the proper functioning of the institution"); Eighth Circuit: *Gieringer* v. *Center School Dist.*, 477 F.2d 1164, *cert. denied*, 414 U.S. 832 (1973) (no ground for dismissal absent a showing of disruption of the teacher's classroom duties or the regular operation of the school); *Birdwell* v. *Hazelwood School Dist.*, 491 F.2d 490 (1974); Ninth Circuit: *Adamian* v. *Jacobsen*, 523 F.2d 929, 934 (1975) ("only where expressive behavior 'involves substantial disorder or invasion of the rights of others' may it be regulated by the state"); Tenth Circuit: *Rampey* v. *Allen*, 501 F.2d 1090, 1198 (1974), *cert. denied*, 420 U.S. 908 (1975) (no evidence that teachers' conduct constituted any threat to operation of the college); *Bertot* v. *School Dist. No. 1*, 522 F.2d 1171, 1183 (1975) ("undifferentiated fear" of "degeneration" inadequate to justify infringement of First Amendment rights; no showing that actions impeded teacher's proper performance of classroom duties or interfered with operation of school); *Smith* v. *Losee*, 485 F.2d 334, 339 (1973), *cert. denied*, 417 U.S. 908 (1974) (defendant Board must "assume the burden of showing that the plaintiff's acts materially and substantially interfered with the requirements of appropriate discipline in the operation of the school").

er's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering* v. *Board of Education*, 391 U.S. 563, 572-73 (1968).

The validity of this rule—that the school board may penalize a teacher for exercising First Amendment rights only where that exercise has caused or poses a substantial threat of causing material disruption to the educational process—derives from established constitutional analysis. This Court has long held that when the exercise of individual constitutional rights conflicts with the attainment of government's desired goals, the government must give way unless the interest it advances is of substantial importance. *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) ("significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest"). Thus, government action which "touch[es] . . . protected rights" can bar only that " 'specific conduct as constitut[es] a clear and present danger to a substantial interest of the State.' " *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966), quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1939).

Material disruption of the educational process implicates substantial government interests and, accordingly, has been held to legitimize government limitation of First Amendment rights. "Associational activities need not be tolerated when they infringe reasonable [school] rules, interrupt classes, or substantially interfere with the opportunity of . . . students to obtain an education." *Healy* v. *James*, *supra*, 408 U.S. at 189.

The legitimacy of government restraint of "substantial threats" of material disruption to the educational process is similarly well-established. There is obviously little virtue in a rule which requires the state to stand impotent while watching imminent injury become present

harm. Thus, while this Court has held that a state official's "undifferentiated fear or apprehension of disturbance is not enough to overcome" exercise of First Amendment rights, *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503, 508 (1969), it has also held that government can restrain in advance individual actions presenting a high likelihood of harm to significant government interests or, in the words of the cases in the educational context, posing a "substantial threat of material disruption" to the educational process. *Healy* v. *James*, *supra*, 408 U.S. at 189.

As the foregoing discussion discloses, in the instant case, the Calhoun County educational authorities could legitimately refuse to reemploy teachers with children enrolled at the Calhoun Academy only if their employment would either have materially disrupted, or posed a substantial threat of material disruption to, the educational process.

b. *A School Board's Forecast of a Substantial Threat of Material Disruption to the Educational Process Must Be Based on Concrete Facts*

While, as we have indicated, a school board can bar or penalize constitutionally-protected conduct which it anticipates will pose a substantial threat of material disruption to the educational process, this Court has established that a board can act on the basis of such a prediction only if it has before it "facts which might reasonably have led [it] to forecast substantial disruption of or material interference with school activities." *Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U.S. at 514. Numerous lower courts have applied this standard to First Amendment activities in the educational context. The Second Circuit has stated, for example, that limitations on the exercise of a teacher's constitutional rights

"can be justified only by a conclusion, based on reasonable inferences flowing from concrete facts and not abstractions, that the interests of . . . sound education are materially and substantially jeopardized." *James* v. *Board of Educ.*, 461 F.2d 566, 571 (2d Cir. 1972). Other courts of appeals have held to the same effect. *Bertot* v. *School District No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975); *Acanfora* v. *Board of Educ.*, 491 F.2d 498, 501 (4th Cir. 1974); *Shanley* v. *Northeast Indep. School District*, 462 F.2d 960, 970-71 (5th Cir. 1972); *Quarterman* v. *Byrd*, 453 F.2d 54, 59 (4th Cir. 1971); *Scoville* v. *Board of Education*, 425 F.2d 10, 13-15 (7th Cir. 1970); *Norton* v. *Discipline Comm.*, 419 F.2d 195, 199 (6th Cir. 1970).

While these cases involve protected speech, this Court has explicitly held that government can limit associational activities which pose a substantial threat to the educational process only if the prediction that such harm will occur is "factually supported by the record," *Healy* v. *James*, 408 U.S. at 188.

2. *Government Must Minimize Unnecessary Infringement of Constitutional Rights*

The second standard that the board's policy must meet is the rule that, even if the state is promoting an interest which is substantial, the means utilized by the state to achieve its goal must be narrowly tailored to that end. This Court has said:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The cases to the same effect are legion, and the principle—that "[p]recision of regulation must be the touchstone" when the state seeks to limit fundamental constitutional rights—seems authoritatively established and beyond dispute. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Accord, *e.g.*, *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). See also *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) ("The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty in support of their legitimate goals.").

In the instant case, accordingly, even though the state may legitimately rid its schools of racist influences, it may do so only in a way that minimizes infringement of constitutional rights.

3. *The Government Must Make an Individualized Showing of Harm Where It Seeks To Penalize Mere Association*

The third standard that the board's policy must meet is the principle that the State cannot penalize an employee, pursuant to a general rule, for mere association with a group, unless it can establish, in each case, that such association in fact poses the threat of harm upon which the rule is based. The point is illustrated by *United States* v. *Robel*, 389 U.S. 258 (1967), when the Court held unconstitutional a statute barring any member of the Communist Party regardless of the quality and degree of memberhip, from being employed at a defense facility. The vice perceived by the Court was that "[t]he statute quite literally establishes guilt by association alone, without any need to establish that the individual's association poses the threat feared by the Government in proscribing it." *Id.* at 265.

A different standard may obtain where a general rule is adopted prohibiting more active conduct of government employees that is reasonably considered to pose, as a general matter, a substantial threat of harm to the efficiency of the service. Thus, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld a statute barring federal employees from taking "an *active* part in . . . political campaigns," 413 U.S. at 550 (emphasis added), even though the Court presumed that not every employee's associational activities would interfere with the efficiency of the public service.

This distinction is supported by a long line of decisions in which the "Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy* v. *James*, 408 U.S. 169, 185-86 (1972); *United States* v. *Robel*, 389 U.S. 258 (1967). The government cannot presume harm from the mere fact of association, but must look to whether the association is active or passive and whether the individual has merely joined the association or has joined with a specific intent to further the unlawful aims of the group. *E.g.*, *Healy* v. *James*, 408 U.S. 169 (1972); *United States* v. *Robel*, *supra*, 389 U.S. at 262; *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

C. The Board's Refusal to Reemploy Petitioners Violated Their Constitutional Rights

1. *The Policy Is Invalid on Its Face Because It Impermissibly Presumes That Any Teacher Whose Child Is Enrolled in the Calhoun Academy Poses a Substantial Threat of Material Disruption to the Educational Process*

The rule pursuant to which petitioners were discharged—even limited as applicable only to teachers with children in Calhoun Academy—is unconstitutional on its face. The rule bars the employment and reemployment of public school teachers who do not remove their children from Calhoun Academy and place them in the public schools, thus impinging substantially upon the constitutional rights of such teachers. As demonstrated above, see pp. 21-27 *supra*, the rule therefore can be justified only if it is narrowly drawn to prevent material and substantial disruption, or a substantial threat of material disruption, to the educational process. In fact, however, the rule was drawn as a broad, prophylactic measure impermissibly presuming that a teacher's association with the Calhoun Academy, without regard to the nature and degree of that association, poses a substantial threat of material disruption to the educational process in the public schools.

The plain words of the board's rule demonstrate that the rule is not narrowly tailored to serve the state's substantial interest in eliminating all vestiges of the dual school system from the public schools without unnecessarily infringing on the teachers' constitutional rights. The rule bars from employment all teachers who have children in Calhoun Academy, not just teachers who are "active" supporters of the Academy and its racial policies. Under the cases, a rule barring the latter class of teachers from employment in the public schools might be justified if the school board could demonstrate that as

a general matter a teacher's active involvement with a racially segregated institution reasonably might be expected to carry over into, and substantially disrupt, the operation of the public schools. The board's rule contains no such limitation, however, indiscriminately barring both teachers actively involved in fostering the Academy's racial philosophy and teachers passively involved with the Academy and affiliated only to the extent of sending their children there.

The simple fact of his child's enrollment in the Calhoun Academy is not sufficient to mark a teacher as an active supporter of the racial views or practices advanced by the Academy. The child could be enrolled in the Academy for a reason having little to do with the racial views of his parent, as, for example, where the parent is deferring to legitimate medical advice, acquiescing in a spouse's decision, or simply agreeing to the child's own wishes. None of these reasons would unambiguously mark the parent as an active supporter of the Academy or its unlawful policy of excluding black students.

Since the rule does not distinguish between active supporters and passive patrons of an organization, the rule can only be defended on the ground that all teachers with children in the Calhoun Academy pose a substantial threat of material disruption of the county's public schools. The evidence in the record does not support a conclusion, however, that in each and every case the mere presence of a teacher's child at the Calhoun Academy would substantially disrupt or threaten substantially to disrupt the educational process.

The testimony of neither of the expert witnesses presented by the board justified the prophylactic approach which the board adopted in its rule. The experts each testified that a teacher with his own children in private school might set lower expectations for public school children that would cause such children to "*tend* to perform at a lower level" (App. 102), so that they "*probably* would not achieve as well" (App. 124). The experts also testified that "a teacher sending [his] children to a private school would be evidencing rejection of the public school system . . . and students would perceive this rejection" and that this would undermine the educational process (App. 100; see also App. 123-24).[7]

However, the experts expressed uncertainty as to whether these effects would apply in every case. Indeed, they testified that the board's policy should *not* be applied in a prophylactic fashion. Thus, Dr. Eicke testified that a policy like the Calhoun policy "should not be a blanket policy but that each case should be taken on its individual merits and decided on those merits" (App. 113). Likewise, Dr. Harlan testified that he "wouldn't have an opinion on any particular teacher [but] would have to talk to the specific teacher on that" (App. 127). If even the board's experts would have had to talk to a particular teacher to determine his effect on the educational process and if they would not have adopted a blanket policy like that of the board, the board can hardly find support for its rule from their testimony.

A similar infirmity lies in the trial judge's determination that "an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and distrust in de-

[7] We have grave difficulty with the "rejection" concept as a justification for a restriction on the exercise of a teacher's First Amendment rights. For example, were a teacher to write a letter to a newspaper criticizing inadequacies in his public school, surely the potential that students in that school might feel rejected would not be a sufficient ground for his termination. *Pickering* v. *Board of Education, supra,* 391 U.S. at 572 ("Teachers are members of a community most likely to have informed and definite opinions [on] . . . the operation[s] of the schools . . . . Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

segregated schools" (Pet. App. 39a). The trial court's conclusion was based upon this Court's statement in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), that "The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests by its own actions that its educational processes are based on private belief that segregation is desirable in education." (Pet. App. 39a). This statement, however, in no way establishes the attitude of every parent of a child in such a school. Thus, as one of the board's expert witnesses acknowledged, there may be circumstances in which a parent elects to send his child to such a school not because of its policy of racial segregation but because it has special facilities which do not exist in the public schools (App. 112). And, as discussed *supra*, p. 30, such an election may be motivated by other considerations equally independent of the policy of racial segregation.

Additional alleged support for the rule came from the members of the Calhoun County school administration who believed that the rule was an appropriate measure designed to eliminate all vestiges of the dual school system. We do not challenge the good faith nature of that belief. The cases are clear, however, that a school administration cannot infringe the constitutional rights of its teachers simply because it believes it is justified in doing so. See pp. 21-26. Rather, a school board can limit a teacher's exercise of his constitutional rights only by showing that that exercise materially disrupted or posed a substantial threat of materially disrupting the educational process. The testimony of the school administration witnesses was devoted largely to the circumstances surrounding the adoption of the board policy, and respondents simply did not attempt to prove that teachers who had their children in the Calhoun Academy in fact caused, or posed a substantial threat of causing, harm to the educational process.

To be sure, Mr. Mallory referred to "complaints" he had received from parents regarding teachers who had their children in the Calhoun Academy. There was no showing in the record, however, that the complaints concerned a failure of the educational process, or that the parents believed that their children would learn less well because teachers had enrolled their own children at the Calhoun Academy. Similarly, Mr. Mallory testified that "people that have kids in private schools . . . were hard prejudiced against the public schools" and "some of that is going to carry through for those teachers that have kids [at Calhoun Academy]" (App. 201). Again, there was no showing in the record that the racial prejudice in fact had "carr[ied] through" to the teachers. The presumption that Mr. Mallory made, based solely on the teachers' association with Calhoun Academy, is precisely the kind of presumption that this Court has repeatedly held unconstitutional. *United States* v. *Robel*, *supra*. Finally, Mr. Mallory testified that "there has just got to be a little friction" between teachers with their children at the Academy and those with children in public schools (App. 211). Again, there was no showing in the record that any such friction actually had occurred, even though the board had several years since the opening of the Calhoun Academy to observe whether it would be created.

A word should be said about the trial court's conclusion that the policy in question was justified as a means of insuring that the desegregated public schools—facing the possibility of white flight to the "segregation academy" and needing community support—had the "undivided loyalty" of their teachers (Pet. App. 38a). Encroachments on a teacher's First Amendment right, however, cannot be based upon an asserted requirement of undivided allegiance to the school system. In *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), this Court held unconstitutional the dismissal of a teacher for exercising a First Amendment right to criticize the school board not-

withstanding the board's contention that the teacher owed a "duty of loyalty" to support the public school system.

In sum, the board's rule lacked evidentiary support. Instead the rule operated on a presumption long discredited by this Court that any degree of involvement with an undesirable organization justifies the infringement by a school board of an individual teacher's constitutional rights. *United States* v. *Robel, supra; Healy* v. *James, supra.* Since the board's rule is unconstitutional on its face, the board's refusal to rehire the petitioners, based solely on the rule, should also be struck down as unconstitutional.

Petitioners should, of course, be allowed to assert this facial invalidity of the rule. In *Young* v. *American Mini Theatres*, 44 U.S.L.W. 4999, 5002 (June 24, 1976), this Court ruled that governmental regulations might be attacked on their face if their deterrent effect on legitimate First Amendment rights was " 'both real and substantial' " and if the regulation was not " 'readily subject to a narrowing construction by the state courts,' " quoting *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1974). Here, the board policy is not readily susceptible of any further limiting construction[8]; both the district court and the court of appeals have already construed the policy to apply only to teachers with children in Calhoun Academy, a construction far more narrow that the literal terms of the policy (and, indeed, perhaps more narrow than warranted by the record). Likewise, the deterrent effect of the statute is real and substantial; the record discloses that five teachers other than petitioners have already been "induced" not to exercise their

[8] The board policy might be construed, contrary to its plain terms, to include an "active intent" requirement. Any such construction would require a reversal of the decisions below because no finding was made that the petitioners had actively promoted the aims of the Calhoun Academy.

constitutional right to send their children to the Calhoun Academy (App. 217).

In sum, petitioners may appropriately challenge the board's policy on its face, and, on its face, the policy is unconstitutional.

2. *The Rule Was Unconstitutional As Applied to Petitioners Because the Board Made No Showing That the Teachers Had Materially Disrupted or Posed a Substantial Threat of Material Disruption to the Educational Process*

Even apart from the general validity of the board's policy, its application to bar reemployment of the teachers in this case was unconstitutional because the record is devoid of any evidence showing that any one of these teachers had caused material and substantial disruption to the educational process or posed a substantial threat to the educational process. Indeed, the record is devoid of any evidence as to the impact caused by these particular teachers. Thus, while the goal pursued by the school board—eliminating the vestiges of a dual school system from the public schools—is indeed substantial, the board was not justified in refusing to reemploy the teachers without a showing that the teachers' exercise of their constitutional rights had caused or would cause the harm the board sought to eliminate.

The board made no attempt to show that these teachers had in fact caused material and substantial harm to the educational process. All the evidence was to the contrary. The teachers were competent. They had each taught in the Calhoun public schools for several years after the schools were integrated and while their own children were in the Calhoun Academy. There was no evidence in the record that any complaints had been received regarding their performance. They would have been rehired by the board except for the adoption of the policy.

There is accordingly no basis in the record on which to conclude that the teachers had in fact had any detrimental effect on the educational process.

There likewise is no basis on which to conclude that the teachers posed a substantial threat to the educational process. The teachers' past history of competent performance substantially belied that accusation, and no other evidence in the record supported it. Certainly, the testimony of the expert witnesses did not. Rather, as noted above, each of the experts testified that before he could predict a teacher's impact on the educational process, he would have to speak to the teacher.

The experts did testify that they believed that every teacher in the state system "owes an obligation to send his or her children to public school" (App. 109, 132), and, indeed, Dr. Eicke even testified that "every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her children to a public school" (App. 109-10). The experts' personal beliefs in a teacher's "obligation" to the school system do not amount to evidence that a teacher who does not comply with this "obligation" poses a substantial threat to the system. Indeed, the experts made no such claim, stating, as noted above, that a prediction as to a teacher's impact on the educational system could be ventured only after an evaluation of the particular teacher. The board made no such evaluations of the petitioner teachers, however, instead refusing to reemploy them solely because their children were enrolled at the Calhoun Academy.

In sum, there was no evidence in the record showing that the teachers posed a substantial threat of material disruption to the educational process. This Court has held, however, that a school board can penalize the assertion of First Amendment rights for such a reason only if there are concrete facts in the record to support the action. See pp. 25-26, *supra*. In the absence of such a showing—or of a showing, absent here, that the teachers had in fact disrupted the educational process—the teachers could not constitutionally be refused reemployment for exercising their constitutional right to send their children to the Calhoun Academy.

CONCLUSION

For the foregoing reasons we urge that the writ of certiorari be dismissed as improvidently granted. Alternatively, if the Court determines to reach the merits, we urge that the judgment of the court of appeals be reversed.

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